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In the Supreme Court of the United States

OCTOBER TERM, 1979

NO. 79-1240

MRS. JOYCE ROY STOCKSTILL, et al

Petitioner,

VS.

GYPSUM TRANSPORATION, et al

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO REVIEW THE DECISION OF THE FIFTH CIRCUIT COURT OF APPEAL

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SUPREME COURT OF THE UNITED STATES

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NO.

MRS. JOYCE ROY STOCKSTILL, et al

VS.

GYPSUM TRANSPORATION, et al

PETITION FOR A WRIT OF CERTIORARI TO REVIEW THE DECISION OF THE FIFTH CIRCUIT COURT OF APPEALS

Joyce Roy Stockstill, petitioner, prays that a writ of certiorari issue to review the decision of the Fifth Circuit Court of Appeals, entered in the above and entitled case of January 14, 1980.

CITATIONS TO OPINIONS BELOW

The opinion of the Judge of the United States District Court granting a directed verdict, printed in Appendix C, was unreported. The opinion of the Fifth Circuit Court of Appeals, printed in Appendix B hereto, is reported at 607 F.2d 1112. The final judgment of the Fifth Circuit Court of Appeals, after denying petitioner for en banc review, printed in Appendix A, is unreported.

JURISDICTION

The judgment of the Fifth Circuit Court of Appeals, affirming the directed verdict of the lower court and denying a petition for rehearing en banc, is printed hereto in Appendix A. The jurisdiction of this Court is invoked under 28 USC 1254(1).

QUESTIONS PRESENTED FOR REVIEW

In the instant case of Stockstill, the majority panel of the Fifth Circuit Court of Appeals, at page 1502, recited this rule:

> "...Instead, we have formulated a rule that the *owner of a vessel is not liable for unknown or obvious hazards where either the stevedore or his employee is in better position to appreciate fully the risk and avoid the danger, particularly where the danger is within the control of the stevedore's own employees.*" (Emphasis ours.)

Is that rule contra to *Edmonds v. Compagnie Generale Transatlantique?* NOTE 8, 99 S.Ct. 2753, which reads:

> "Restatement (Second) of Torts 433A, 875, and 879 (1979); T. Cooley, Law of Torts 142-144 (1879); *W. Prosser,* Handbook of the Law of Torts, 47, at 297-299, and 52, at 314-315 (4th ed. 1971); cf. *Washington & Georgetown R. Co. v. Hickey,* 166 U.S. 521, 527 (1897). *A tortfeasor is not relieved of liability for the entire harm he caused just because another's negligence was also a factor in effecting the injury.*" (Emphasis ours.)

STATUTES INVOLVED

(1) Section 33 U.S.C. 905 (b) of the Longshoreman and Harbor Workers' Act. Printed in Appendix D.

(2) Safety Statute, 29 CFR 1915.1(c) and (d).

(3) Safety Statute, 29 CFR 1915.2(c).

STATEMENT OF THE CASE

1. Legal Proceedings.

On November 21, 1973, the original plaintiff, Lowell Stockstill, filed a complaint with the U. S. District Court for the Eastern District of Louisiana. On February 14, 1974, an answer was filed by Gypsum Transporation. Prior to the trial of the merits and more particularly on December 30, 1975, the defendant shipowner filed a motion for a summary judgment. That motion was dinied on January 26, 1976. The same defendant shipowner filed a second motion for a summary judgment on March 13, 1977 and the second motion was denied on March 23, 1977. On April 11, 1977 a trial was had before a jury.

After all evidence was submitted, the defendant shipowner urged a motion for directed verdict, which was granted. On April 22, 1977, the plaintiffs-appellants filed a motion for a new trial, which was denied. Judgment was entered in behalf on the defendant shipowner on May 13, 1977. Plaintiff-appellants filed a new motion for a new trial on May 18, 1977 and the same was denied. From these proceedings, the plaintiffs-appellants appealed. On December 5, 1979, a panel of

the Fifth Circuit, Court of Appeals, split into a majority panel, affirming the prior judgment of directed verdict, with a minority panel dissenting. From the split decision of the panel, the appellants petitioned for a hearing en banc or in the alternative for a rehearing, which was denied. Final judgment entered adverse to Mrs. Stockstill was January 14, 1980, as per Appendix A.

REASON FOR GRANTING THE WRIT

1. The decision in the instant Stockstill case is contrary to the following:

   a. *Edmonds v. Compagnie Generale Transatlantique*, USC No. 78-479, 99 S.Ct. 2753 (1979).

   b. The Fifth Circuit's own *Gay v. Ocean Transport & Trading, Ltd.*, 546 F.2d 1237.

In the instant case of Stockstill, the majority panel of the Fifth Circuit, at page 1502 of the appellate opinion judgment, recited the aforementioned rule quoted in "Question Presented for Review":

> "...Instead, we have formulated a rule that the *owner of a vessel is not liable for known or obvious hazards where either the stevedore or his employee is in better position to appreciate fully the risk and avoid the danger, particularly where the danger is within the control of the stevedore's own employees."* (Emphasis ours.)

It is submitted that the underscored rule for this particular case is contra and goes beyond *Gay v. Ocean Transport & Trading, Ltd.*, 546 F.2d 1237.

At page 1501 of the slip opinion, the Fifth Circuit Court of Appeals reported:

> " In granting the directed verdict the district court relied on the fact that the dangerous condition that allegedly caused the injury to Stockstill *was open, obvious and known to him before his injury.* ..." (Emphasis ours.)

The minority opinion, at Page 1504, reported the matter differently:

> "As for the obviousness of the danger to Stockstill, there is no evidence that he knew of the grease on the ladder or the oil on the deck. I could not say that either were open and obvious to all who walked there the first time. But that is not matter for present purposes, because grease on the ladder or oil on the deck fit the rule which requires the shipowner to anticipate the harm despite obviousness of danger. Restatement (Second) of Torts (1965) Section 343A(1). This is precisely the subject of this court's comment in *Gay v. Ocean Transport & Trading, Ltd.* (1977) 546 F.2d 1233 at 1240-1242."

What is true of the instant case of Stockstill is also true of a companion case, (also in the Fifth Circuit) *McCullough v. Coppename*, No. 77-1066, decided December 14, 1979, wherein the majority panel for McCullough held at page 1714:

> "...that the problem with broken boards was apparent, open, obvious, correctible, and within the control of United; hence, the Coppename cannot be held to account for United's failure to protect its longshoremen."

But which minority panel at page 1715 reported:

" GODBOLD, Circuit, Judge, dissenting:

> The majority opinion is unfortunate withdrawal from the principles decided for this circuit by Judge Tjoflat's comprehensive opinion in *Gay v. Ocean Transport & Trading, Ltd.*, 546 F.2d 1233 (CA5, 1977). The present case should not have been decided on summary judgment."

A simple review of the two majority panels as opposed by the two minority panels in Stockstill and McCullough indicate an obvious conflict within the circuit.

This obvious dispute and conflict within this circuit carries over to other circuits.

In the Second Circuit, *Cox v. Flota Mercante,* 577 F.2d 798, there was a holding comparable to that of the instant majority of Stockstill and also McCullough. But *Cox v. Flota Mercante,* supra, conflicts with three other Second Circuit cases:

The Cox ruling is in conflict with *Lubrano v. Royal Netherlands Steamship Co.* 572 F.2d 364 CCA 2nd Cir. decided February 15, 1978, written by Judge C. J. Feinberg.

Lopez v. Svendborg, 581 F.2d 319 CCA 2nd Cir. decided July 24, 1978 written by Judge J. Blumenfeld and *Canizzo v. Farrell Lines,* 579 F.2d 682 CCA 2nd Cir. decided June 22, 1978 written by Judge C. J. Joseph Smith, and with a dissent by Judge C. J. Friendly, conflicts with his Cox case.

A footnote from Page 508 in *Davidson v. Pacific Island*, 569 F.2d 507 (1978) has this summation of the problem:

> " However, the courts have already split on the proper standard of negligence. The Second and Fifth Circuits have adopted the standard of care in Restatement (Second) of Torts 342, 343 and 343A, which relate to a landowner's liability to envitees or licensees. See *Brown v. Mitsubishi Shintaku Ginko*, 550 F.2d 331 (5th Cir. 1977); *Gay v. Ocean Transport & Trading Ltd.*, 546 F.2d 1233 (5th Cir. 1977); *Napoli v. Hellenic Lines, Ltd.*, 536 F.2d 505 (2d Cir. 1976). The Fourth Circuit has approved the use of Reinstatement (Second) 343 in *Anuszewski v. Dynamic Mariners Corp., Panama*, 540 F.2d 757 (4th Cir. 1976), cert denied, 429 U.S. 1098, 97 S.Ct. 1116, 51 L.Ed.2d 545 (1977). The Third Circuit in *Hurst v. Triad Shipping Co.*, 554 F.2d 1237 (3d Cir.) cert. denied 434 U.S. 861, 98 S.Ct. 188, 54 L.Ed.2d 134 (1977) has referred to Restatement (Second) 409, which applies to independent contractors. That section provides:
>
> > Except as stated in 410-429, the employer of an independent contractor is not liable for physical harm caused to another by an act or ommission of the contractor or his servents.
>
> The Third Circuit has specifically disapproved of the use of 343 and 343A. See *Hurst*, supra, at 1249 n.35, *Brown v. Ivarans Rederi A/S*, 545 F.2d 854, 863 n. 10 (3d Cir. 1976), cert. denied 430 U.S. 969, 97 S.Ct. 1652, 52 L.Ed 2d 461 (1977)."

The majority panel in Stockstill (also McCullough) is (are) in error in review of their prior *Gay v. Ocean Transport & Trading, Ltd.* (5CA) 546 F.2d 2137. With a full reading of *Gay* there were four principles outlined as exceptions to be

applied to the Restatement of Torts test of Sections 342, 343 and 343(a). The fourth principle exception outlined by *Gay* was:

> "(4) However, certain land-based principles of state law are not to be carried over into the federal law governing LHWCA suits. Assumptions of risk may not be utilized as a defense, and comparative negligence, rather than contributory negligence, is to be applied."

This exception (4) of *Gay*, supra, was not followed in the instant case of Stockstill.

The minority opinion in the instant case of Stockstill recognized the rule "which requires the shipowner to anticipate the harm despite obviousness of danger" (Page 1504).

The rule of the majority panel is contra to *Edmonds v. Compagnie Generale Translantique*, 99 S.Ct. 2753 (1979). Justice White reported in Edmonds:

> "...The liability of the ship to the longshoreman is determined by a combination of judge-made and statutory law and, in the present context, depends on a showing of negligence or some other culpability."

In Note 8, at 99 S.Ct. 2753, there is this passage:

> "Restatement (Second) of Torts 433A, 875, and 879 (1979); T. Cooley, Law of Torts 142-144 (1879); W. *Prosser*, Handbook of the Law of Torts, 47, at 297-299, and 52, at 314-315 (4th ed. 1971);

cf. *Washington & Georgetown R. Co. v. Hickey*, 166 U. S. 521 (1897). A tortfeasor is not relieved of liability for the entire harm he caused just because another's negligence was also a factor in effecting the injury."

SAFETY STATUTES

In support of the affirmation of the lower court's directed verdict, the majority panel in Stockstill reiterated in their majority opinion an interpretation of the shipowner concerning 29 CFR 1915.1(d) at page 1503, which read:

"...As the regulations point out, the responsibility for compliance with these rules lies solely with the stevedores or employees of repairmen on board vessels and not with the 'owners, operators, agents or masters of vessels.' 29 C.F.R. 1915.1(c) & (d) and 1915.2(c)."

The foregoing interpretation is not a verbatim quote of 29 C.F.R. 1915.1(c) or (d). Nor is it a verbatim quote of 1915.2(c). Instead, 29 C.F.R. 1915.1(c) and (d) provides, verbatim:

"(c) The responsibility for compliance with the regulation of this part is placed upon 'employers' as defined in 1915.2(c).

(d) It is not the intent of the regulations of this part to place additional responsibilities or duties on owners, operators, agents or masters of vessels unless such persons are acting as employees, nor is it the intent of *these regulations to relieve such owners, operators, agents or masters of vessels from responsibilities or duties now placed upon them by law, regulation or custom.*" (Emphasis ours.)

From the viewpoint of the district court judge rendering a directed verdict, as well as the majority panel of the Fifth Circuit, the decedent and his co-workers, in the instant Stockstill case, were endowed with legal ability and duty to see moreso than 37 crew members, even though 37 crew members had the roam of the vessel, at their choice morning, noon, night, before, after, in between means, showers, exercise or in any way they live aboard the vessel.

Like the district court, the appellate majority panel decided as a matter of law that the plaintiff knew or should have known about this hazardous condition, because it was open and obvious. At Page 1502, the majority panel held:

> " (4-6) ...not only was the danger of the grease open and obvious to Stockstill and his co-workers, but the area where it was observed was under the control of the ship repairer, Buck Kreihs, and presented a risk of which the plaintiff and his employer were fully able to appreciate and avoid. Further, there was no evidence that the shipholder or any member of the crew knew or should have known of grease or oil on the deck. ..."

For thirty-seven members of the crew aboard the vessel, on the day of the accident, the same hazardous conditions were secreted and hidden. The appellate majority panel decided as a matter of law that the shipowner could not have had knowledge of the hazardous condition. At Page 1501, the majority panel explained:

> "...A review of the record reveals no evidence of any action by any member of the vessel's crew which would permit a reasonable finding that the ship's crew caused either the accident or the grease condition which it is contended resulted in the accident to Stockstill. ..."

Thus, systematically the majority panel immunized the ship's crew from observing what is open and obvious.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that copies of the foregoing Petition For A Writ of Certiorari have been served upon opposing counsel by mail on this 7th day of February, 1980.

CHARLES R. MALONEY

APPENDIX A

Mrs. Joyce Roy STOCKSTILL, Widow of Lowell Stockstill, individually and as Natural Tutrix of the minor children, etc., Plaintiff-Appellant,

v.

GYPSUM TRANSPORATION, Defendant-Appellee,

Fidelity & Casualty Company of New York, Intervenor.

No. 77-2439.

United States Court of Appeals, Fifth Circuit.

Dec. 5, 1979.

Appeal from the United States District Court for the Eastern District of Louisiana.

Before GEWIN, AINSWORTH and REACLEY, Circuit Judges.

AINSWORTH, Circuit Judge:

This maritime negligence suit was originally brought by Lowell Stockstill against Gypsum Transporation, Ltd., owner of the vessel GYPSUM QUEEN, for damages for physical injuries sustained when he slipped and fell while working on board the vessel for an independent shiprepairer. Buck Kreihs Company, Inc., the marine contractor, was performing extensive reparis on the vessel at the contractor's repair facility upon the navigable waters of the Mississippi River at New Orleans. Stockstill died prior to trial and his surviving widow,

Joyce Roy Stockstill, was substituted as plaintiff in her own behalf and for the children of the deceased. The complaint was amended to allege a death claim against defendant.

At the close of all of the evidence at the trial, the district judge granted defendant's motion for a directed verdict. Claimant brings this appeal asserting that the district judge erred in directing a verdict against her. After a careful review of the record, we find that the district court was correct in its ruling and affirm.

On April 30, 1973, Lowell Stockstill and Shady Phillips were sent by their union to work as welders for Buck Kreihs Company on board the GYPSUM QUEEN. They were assigned to the evening shift, and at approximately 5 p.m., upon the conclusion of the day shift, the men boarded the vessel. Anthony Battaglia, a Buck Kreihs "pusher" or foreman, took them to the forepeak tank at the bow if the vessel where they were to work. Battaglia entered the tank first through a manhole in the deck and descended a vertical ladder to the first level of staging previously set up by other Buck Kreihs employees. Stockstill followed. After descending the ladder approximately halfway between the deck and the staging so that his head was below deck level, Stockstill reached up to Shady Phillips, who handed him his welding hood, gloves and other equipment. He took the equipment with his right hand, holding on to a rung of the ladder with his left hand. As he attempted to hand down the equipment to Battaglia, he lost his balance and fell from the ladder. Stockstill fractured his right ankle as a result of the fall.

At trial Stockstill's deposition was admitted into evidence. He stated therein that he fell from the ladder when his

left hand slipped from the rung. Subsequent to the accident, he noticed oil or grease on his hand. His wife also testified that she found a black substance on her husband's hand. Stockstill's friend Shady Phillips testified that there was a patch of oil about four feet across on the deck leading to the ladder in the hold where the fall occurred.

The district court granted a directed verdict in favor of defendant, finding that while there was some evidence that the ship's crew was on the vessel at the time of the accident, none of the ship's personnel was participating in the work being performed by Buck Kreihs Company nor were they in the area of the accident at the time of Stockstill's fall. In written Reasons for Directed Verdict, the court concluded that plaintiff only failed to prove any affirmative negligence on the part of the vessel, but that the evidence failed to show defendant was responsible for a dangerous condition on the ship of which Stockstill was not aware or was not in a position to fully appreciate.

In *Boeing Co. v. Shipman,* 5 Cir., 1969, 411 F.2d 365, 374, we formulated the standard by which the evidence is to be measured in considering a motion for a directed verdict:

> On motions for directed verdict and for judgment notwithstanding the verdict the Court should consider all of the evidence - not just that evidence which supports the non-mover's case - but in the light and with all reasonable inferences most favorable to the party opposed to the motion. If the facts and inferences point so strongly and overwhelmingly in favor of one party that the Court believes that reasonable men could not arrive at a contrary verdict, granting of the motions is

> proper. On the other hand, if there is substantial evidence of such quality and weight that reasonable and fairminded men in the exercise of impartial judgment might reach defferent conclusions, the motions should be denied, and the case submitted to the jury. A mere scintilla of evidence is insufficient to present a question for the jury.

[1] It is for the court to determine whether a case should be withdrawn from the jury if plaintiff's evidence is inadequate under the *Boeing* test to warrant submission to the jury. However, this does not mean that the court should base its decision on a determination of "which side has the better of the case." *Boeing, supra,* 411 F.2d at 375. All reasonable inferences must be drawn in favor of the party opposed to the motion. On the other hand, "a complete absence of probative facts to support a jury verdict" is not a prerequisite to directing a verdict; but "[t]here must be a conflict in substantial evidence to create a jury question." *Boeing, supra,* 411 F.2d at 375. A review of the record shows that appellant's evidence was insufficient to present a question for the jury.

When Congress amended the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. § 901 *et seq.*, in 1972, it eliminated the shipowner's traditional and absolute liability for breach of the nondelegable duty to provide those who come aboard a vessel with a safe place to work. In its stead, Congress chose to improve the compensation benefits granted an injured employee by his stevedore/employer, at the same time making a vessel liable only for its own negligence. [1] By adding section

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1. In the House Report on the bill which proposed the amendment the Committee stated:

Accordingly, the Committee has concluded that, given the

(footnote 1 continued on following page)

905 (b) [2] to the Act, Congress "specifically preclude[d] an employee of an independent stevedoring contractor from bringing a suit against the vessel 'based upon the warranty of seaworthiness or a breach thereof at the time the injury occurred.' " *Bess v. Agromar Line*, 4 Cir., 1975, 518 F.2d 738, 741 (quoting 33 U.S.C. § 905(b)). The reason for limiting recovery to an action based solely on a traditional theory of negligence is set out in the House Report on the bill which proposed the amendments to the Act:

(footnote 1 continued)
improvement in compensation benefits which this bill would provide, it would be fairer to all concerned and fully consistent with the objective of protecting the health and safety of employees who work on board vessels for the liability of vessels as third parties to be predicated on negligence, rather than the no-fault concept of seaworthiness.
J.R.Rep. No. 1441, 92d Cong., 2d Sess., *reprinted in* [1972] U.S.Code Cong. & Admin. News, pp. 4698, 4703.

2. (b) In the event of injury to a person covered under this chapter caused by the negligence of a vessel, then such person, or anyone otherwise entitled to recover damages by reason thereof, may bring an action against such vessel as a third party in accordance with the provisions of section 933 of this title, and the employer shall not be liable to the vessel for such damages directly or indirectly and any agreements or warranties to the contrary shall be void. If such person was employed by the vessel to provide stevedoring services, no such action shall be permitted if the injury was caused by the negligence of persons engaged in providing stevedoring services to the vessel. If such person was employed by the vessel to provide ship building or repair services, no such action shall be permitted if the injury was caused by the negligence of persons engaged in providing ship building or repair services to the vessel. The liability of the vessel under this subsection shall not be based upon the warranty of seaworthiness or a breach thereof at the time the injury occurred. The remedy provided in this subsection shall be exclusive of all other remedies against the vessel except remedies available under this chapter.
33 U.S.C. § 905(b).

> The purpose of the amendments is to place an employee injured aboard a vessel in the same position he would be if he were injured in non-maritime employment ashore, insofar as bringing a third party damage action is concerned, and not to endow him with any special maritime theory of liability or cause of action under whatever judicial nomenclature it may be called, such as "unseaworthiness", "non-delegable duty", or the like.

H.R.Rep.No. 1441, 92d Cong., 2d Sess., *reprinted in* [1972] U.S.Code Cong. & Admin.News, pp. 4698, 4703.

[2] Having eliminated the doctrine of unseaworthiness as a basis of liability against the vessel, "Congress did not intend that a concept of negligence approximating no-fault liability should take its place." *Napoli v. Hellenic Lines, Ltd.*, 2 Cir., 1976, 536 F.2d 505, 507. Rather, it is suggested in the legislative history of the amendments that a uniform federal common law stemming from land-based negligence concepts be developed. [3] Accordingly, this court in *Gay v. Ocean Transport & Trading, Ltd.*, 5 Cir., 1977, 546 F.2d 1233, 1238,[4]

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3. The Committee intends that on the one hand an employee injured on board a vessel shall be in no less favorable position vis a vis his rights against the vessel as a third party than is an employee who is injured on land, and on the other hand, that the vessel shall not be liable as a third party unless it is proven to have acted or have failed to act in a negligent manner such as would render a land-based third party in non-maritime pursuits liable under similar circumstances.
J.R.Rep. No. 1441, 92d Cong., 2d Sess., *reprinted in* [1972] U.S.Code Cong. & Admin.News, pp. 4698, 4704.

4. *See also Brown v. Mitsubishi Shintaky Ginko*, 5 Cir., 1977, 550 F.2d 331, 333-34.

adopted the general standards set forth in the Restatement (Second) of Torts for determining what is negligence under section 905(b). [5]

Appellant's claim is apparently based on the argument that the shipowner had knowledge of a hazardous condition on the vessel by virtue of the oil patch on the deck in the area of the accident. A review of the record reveals no evidence of any action by any member of the vessel's crew which would permit a reasonable finding that the ship's crew caused either the accident or the grease condition which it is contended resulted in the accident to Stockstill. Buck Kreihs' foreman Anthony Battaglia testified at trial that the ship's repairer "definitely" was in control of the area of the accident. He further stated that although it would not be unusual for the crew to be

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5. Restatement (Second) of Torts s 342 (1965) provides:

A possessor of land is subject to liability for physical harm caused to licensees by a condition on the land it, but only if,

(a) the possessor knows or has reason to know of the condition and should realize that it involves an unreasonable risk of harm to such licensees, and should expect that they will not discover or realize the danger, and

(b) he fails to exercise reasonable care to make the condition safe, or to warn the licensees of the condition and the risk involved, and

(c) the licensees do not know or have reason to know of the condition and the risk involved.

Section 343 states:

A prosessor of land is subject to liability for physical harm caused to his invitees by a condition on the land if, but only if, he

(a) knows or by the exercise of reasonable care would discover the condition, and should realize that it involves an unreasonable risk of harm to such invitees, and

(b) should expect that they will not discover or realize the danger, or will fail to protect themselves against it, and

(c) fails to exercise reasonable care to protect them against danger.

engaged in some work on the ship during the time it was out of commission for repairs, during the two-week period Battaglia worked on the GYPSUM QUEEN, he never saw any member of the crew in the forepeak tank where the accident occurred.[6] Furthermore, not only was Buck Kreihs Company engaged in welding repairs in the forepeak tank of the vessel, according to the work order and invoices introduced into evidence by plaintiff, but the independent contractor supplied labor equipment and materials to repair and clean nerely the entire ship, at a cost to the vessel owner of approximately $218,000.[7]

In granting the directed verdict the district court relied on the fact that the dangerous condition that allegedly caused the injury to Stockstill was open, obvious, and known to him before his injury. The rule in this circuit relative to the liability of a vessel for known or obvious dangers is expressed in *Gay, supra,* 546 F.2d at 1238, which adopted the principles enunciated in section 343A(1) of the Restatement (Second) of Torts (1965), which section reads as follows:

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6. The only evidence of the ship's personnel performing any work on the vessel in conjunction with Buck Kreihs was supplied by John Lamarco, a Buck Kreihs employee who testified that he furnished the vessel's chief engineer three welders to work with the ship's crew in the engine room, which is not in the vicinity of the forepeak tank where the accident took place.

7. We note in passing that in the first page of the Buck Kreihs Company invoice, the contractor was to supply labor, material and equipment to pump out fuel from the # 2 fuel tank into a barge for storage and to replace it after cleaning the tank, removing the sludge and disposing of it.

> (1) A possessor of land is not liable to his invitees for physical harm caused to them by any activity or condition on the land whose danger is known or obvious to them, unless the possessor should anticipate the harm despite such knowledge or obviousness.

See also in this regard, *Napoli v. Hellenic Lines*, 2 Cir., 1976, 536 F.2d 505; *Bess v. Argromar Line*, 4 Cir., 1975, 518 F.2d 738.

[3] This court has rejected the contention both in *Gay, supra*, 546 F.2d at 1239-40, and later in *Brown v. Mitsubishi Shintaku Ginko*, 5 Cir., 1977, 550 F.2d 331, 333-34, that the shipowner has an automatic nondelegable duty to provide the longshoreman with a safe place to work. Instead, we have formulated a rule that the owner of a vessel is not liable for known or obvious hazards where either the stevedore or his employee is in better position to appreciate fully the risk and avoid the danger, particularly where the danger is within the control of the setvedore's own employees. [8]

[4-6] In this case, not only was the danger of the grease open and obvious to Stockstill and his coworkers, but the area where it was observed was under the control of the ship repairer, Buck Kreihs, and presented a risk of which the plaintiff and his employer were fully able to appreciate and avoid.

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8. *See Samuels v. Empresa Lineas Maritimas Argentinas*, 5 Cir., 1978, 573 F.2d 884, 886; *Briley v. Charente S.S. Co., Ltd.*, 5 Cir., 1978, 572 F.2d 498, 499-500 (U.S. appeal pending); *Hess v. Upper Mississippi Towing Corp.*, 5 Cir., 1977, 559 F.2d 1030, 1035-36, *cert denied*, 435 U.S. 924, 98 S.Ct. 1489, 55 L.Ed.2d 518 (1978).

Further, there was no evidence that the shipowner or any member of the crew knew or should have known of grease or oil on the deck. At trial, Shady Phillips described in some detail the condition of the oil, stating that it appeared as if several persons had walked through it. Phillips also testified, however, that he and Stockstill did not board the vessel until the day shift had departed.

Appellant relies heavily on the fact that some members of the ship's crew were on board the vessel at the time of the accident. Mere presence of the vessel's crew on the ship, however, does not prove knowledge of the hazardous condition. *Fitzgerald v. Compania Naviera La Monlinera,* E.D.La., 1975, 394 F.Supp. 413, 416. Moreover, the evidence adduced at trial established a failure of due care by Buck Kreihs Company in violating two Safety and Health Regulations for Ship Repairing promulgated by the Occupational Safety and Health Administration, as follows:

> Slippery conditions on walkways or working surfaces shall be eliminated as they occur.

29 C.F.R. § 1915.51(c)(1978);

> Hand lines, slings, tackles of adequate strength, or carriers such as tool bags with shoulder straps shall be provided and used to handle tools, materials, and equipment so that employees will have their hands free when using ship's ladders and access ladders. . .

29 C.F.R. § 1915.71(a) (1978). As the regulations point out, the responsibility for compliance with these rules lies solely with the stevedors or employees of repairmen on board vessels and not with the "owners, operators, agents or masters of vessels." 29 C.F.R. § § 1915.1(c) & (d) and 1915.2(c).

In eliminating the warranty of seaworthiness as a basis for imposing liability on the shipowner, it is clear that Congress intended to require a showing of negligence on the part of the vessel owner as is required in land-based torts. [9] Since the vessel owner no longer has an absolute duty to furnish a seaworthy vessel, it cannot be liable for every incident occurring in the course of work performed by and in the control of the independent contractor. [10] Under circumstances here, the vessel owner should not be required to assume "a vigilant concern for the well being of the contractor's employees," particularly where they have failed to exercise due care in the course of their work. *Fitzgerald, supra,* 394 F.Supp. at 417. Accordingly, because plaintiff failed to meet his burden of coming forward with sufficient evidence to create a jury question in accordance with the standards set out in *Boeing, supra,* the order of the district court, directing a verdict in favor of defendant must be affirmed.

AFFIRMED.

REAVLEY, Circuit Judge, dissenting:

I respectfully dissent, because I understand the evidence and legal question differently.

There is evidence that Stockstill fell because the ladder rung was greasy which caused his left hand to slip. Further,

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9. *See* note 3 *supra.*

10. With regard to the condition of the ship, Shady Phillips stated at trial that "in general it was clean for a ship." Anthony Battaglia also testified that the condition of the area where the accident occurred was, in his estimation, safe.

there is evidence that the greasy substance on the ladder was the accumulation of substance from the shoes of those who had walked through oil on the deck of the passageway above the ladder.

Thirty seven members of the crew lived aboard the ship. They may not have been working in the vicinity of the ladder when Stockstill fell, but they did have a tool box in the vicinity and Stockstill thought he saw some of the crew near the area prior to his fall. I find no basis for concluding that the shipowner had divested itself of responsibility for any part of the ship or, particularly, for this ladder and passageway. This is not a case where the stevedore contracts to rid the ship of the very danger which causes injury to the stevedore's employee.

To my view it is a case of the owner/occupier of premises and his invitee. The shipowner does not escape liability because it is not shown to have placed the grease on the ladder, nor because it is not shown to have known of the danger. The question here is whether the shipowner *should* have known of the danger. I would conclude that the evidence tends to prove the presence of the oil and grease for a sufficient period of time that by the exercise of reasonable prudence the shipowner would have discovered that danger. The directed verdict was therefore improper.

As for the obviousness of the danger to Stockstill, there is no evidence that he knew of the grease on the ladder or the oil on the deck. I could not say that either were open and obvious to all who walked there the first time. But that is no matter for present purposes, because grease on a ladder or oil on a deck fit the rule which requires the shipowner to

anticipate the harm despite obviousness of the danger. Restatement (Second) of Torts (1965) Section 343A(1). This is precisely the subject of this court's comment in *Gay v. Ocean Transport & Trading, Ltd.* (1977), 546 F.2d 1233 at 1240-1242.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

October Term, 19

No. 77-2439

D. C. Docket No. CA - 73 - 3060"A"

MRS. JOYCE ROY STOCKSTILL, widow of Lowell Stockstill, individually and as Natural Tutrix of the minor children, ETC.,
Plaintiff-Appellant,

versus

GYPSUM TRANSPORATION,
Defendant-Appellee,

FIDELITY & CASUALTY CO. OF NEW YORK,
Intervenor.

Appeal from the United States District Court for the Eastern District of Louisiana

Before GEWIN, AINSWORTH and REAVLEY, Circuit Judges.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Eastern District of Louisiana, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the order of the District Court appealed from, in this cause be, and the same is hereby, affirmed;

IT IS FURTHER ORDERED that the plaintiff-appellant pay to the defendant-appellee the costs on appeal, to be taxed by the Clerk of this Court.

December 5, 1979

Reavley, Circuit Judge, Dissenting.

ISSUED AS MANDATE: Jan. 14, 1980

APPENDIX C

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

LOWELL STOCKSTILL

VS.

GYPSUM TRANSPORATION, LTD.

NO. 73-3060
CIVIL ACTION
SECTION "A"

JUDGMENT

This matter came on for non jury trial on a former day. After hearing argument of counsel on the motion of defendant, Gypsum Transporation Ltd., for a directed verdict, the Court granted same.

Now, therefore, considering the ruling of the Court, the written reasons of the Court on file herein, and the direction of the Court as to entry of judgment;

IT IS ORDERED, ADJUDGED AND DECREED that there be judgment in favor of defendant, Gypsum Transporation, Ltd., and against plaintiff, Mrs. Joyce Roy Stockstill, dismissing with prejudice, said plaintiffs' claim as to them, each party to bear its' own costs.

New Orleans, Louisiana, this 13th day of May, 1977.

/s/ Nelson B. Jones
NELSON B. JONES, Clerk

APPROVED AS TO FORM:
UNITED STATES DISTRICT JUDGE